

MAR 30 2001

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the matter of)	
)	
Amendment of Section 73.622(b),)	
Table of Allotments,)	MM Docket No. 00-138
)	RM-9896
Digital Television Broadcast Stations)	
(Boca Raton, Florida))	

To: Chief, Video Services Division

REPLY TO COMMENTS IN OPPOSITION TO LETTER REQUEST

The School Board of Broward County, Florida ("School Board"), by counsel, submits its reply to the comments in opposition to letter request submitted by Guenter Marksteiner ("Marksteiner") on March 20, 2001.

On December 5, 2000, the School Board consummated its acquisition of the licenses for noncommercial television station WPPB-TV, Boca Raton, Florida (FCC File No. BAPET-20000216AAA. By letter dated February 26, 2001, the School Board notified Marksteiner and other parties to a settlement agreement filed with the Commission on December 7, 1999 ("Settlement Agreement"), that it was withdrawing from the Settlement Agreement as permitted under the terms of the agreement. The School Board also notified the Commission at that time that it was not interested in pursuing a change to the DTV table of allotments for Boca Raton.

The Settlement Agreement provides, in Section 8, that a party may terminate the Settlement Agreement if "the Commission has not granted the Settlement Agreement within

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twelve (12) months.” Contrary to the protestations of Marksteiner, the Commission has not “granted the Settlement Agreement.”

On March 31, 2000, by letter, the Television Branch dismissed Marksteiner’s application for review and an objection filed by a former licensee of WPPB-TV, and granted the application for FCC consent to the proposed assignment of the FCC authorizations for station WPPB-TV to Channel 63 of Palm Beach, Inc. (“Channel 63”) The letter did not grant the settlement agreement. Rather, the Commission granted an assignment application. For the convenience of the Commission’s staff, a copy of the March 31, 2000, letter is attached hereto as Exhibit A.

Assuming *arguendo* that the March 31, 2000, letter can be construed as a “grant of the Settlement Agreement,” nothing in that Settlement Agreement binds the School Board to silence regarding the effect that a change in the DTV table of allotments would have on the School Board’s duty, as a Commission licensee, to serve the public interest. The School Board has carefully compared its ability to serve Boca Raton on Channel *40 with the service potential of a Channel *44 facility. The School Board has concluded that its public interest obligations are better met by operation on Channel *44, as presently provided in the DTV table of allotments. Having so concluded, the School Board felt that it would be remiss in discharging its public interest responsibilities if it did not bring its conclusions to the Commission’s attention. This it did in its letter of February 26, 2001.

Bringing matters to the Commission's attention is clearly contemplated by Section 2 of the Settlement Agreement, which reads, in pertinent part:

Each...agrees that...it will not...file or encourage, induce or pay any other person to file, any document with the FCC (including any petition to deny or informal objection) that opposes the grant of any application for Channel 59, Stuart, Florida or LPTV Channel 44, serving Miami, Florida filed by Marksteiner or his successors and assigns. This Section 2 shall not prohibit any person from filing with the FCC any declaratory statement bringing relevant information to the FCC's attention, so long as the statement does not object, formally or informally, to the granting of any application. (emphasis supplied).

The School Board's letter of February 26, 2001, was neither a petition to deny nor an informal objection. Rather, as contemplated by Section 2, the School Board has informed the Commission that its public interest responsibilities can best be accomplished with a DTV station on Channel *44.

Marksteiner contends that the Television Branch's letter of March 31, 2000, granted the Settlement Agreement. If that is the case, then Channel 63 took all actions required by the Settlement Agreement by filing the joint petition for rule making on February 8, 2000. On the other hand, if the Settlement Agreement is interpreted to require that the Commission effect a change in the DTV table of allotments, then more than a year has elapsed without that change having been effected. Not only did the March 31, 2000, Letter not grant such a change, action by the Policy and Rules Division is required to amend the DTV table of allotments. Since the instant proceeding has not concluded, it is clear that such an amendment is yet pending.

The Commission has a long-standing policy of not becoming involved in private contractual matters. See *e.g.*, *Metromedia Company*, 3 FCC Rcd 595 (1986); *Sonderling Broadcasting Company*, 74 FCC 2d 657 (1979); *Far East Broadcasting Company*, 58 FCC 2d 60 (1976); *John F. Runner*, 36 RR 2d 773 (1976); *Transcontinent Television Corp.*, 21 RR 2d 945 (1961); and *A.A. Schmidt*, 14 RR 2d 1156 (1957). Marksteiner has shown no reason that the Commission should depart from that policy at this time.

Marksteiner contends that “the proposed substitution of DTV Channel 40 for DTV Channel 44 is an essential part of the Settlement Agreement.” Opposition at ¶ 7. The Settlement Agreement did call for Channel 63 to file a request to amend the DTV table of allotments (Settlement Agreement, Section 4). The Settlement Agreement does not require that any subsequent assignee of the license for WPPB-TV acquiesce to such an amendment, nor to keep silent if it concludes that its duty to serve its community of license in the public interest will be impaired by such an amendment. Neither does it require Channel 63 to prosecute a change in the table of DTV allotments beyond the one year period specified in such agreement, if the agreement has been terminated. It is for the Commission to allocate DTV channels in the public interest, and not for private agreements to fetter that responsibility.

According to Marksteiner, the Commission’s acceptance of the Settlement Agreement constitutes a finding that amendment of the DTV table of allotments as discussed therein would serve the public interest. Opposition ¶ 8. Beyond that, Marksteiner appears to argue

that merely because certain allocation changes were found, on an initial basis, to serve the public interest, those changes must be deemed fixed forever. Marksteiner also contends that the School Board has rejected the Commission's public interest findings and accuses the School Board of "high handed behavior" in so doing. Opposition at ¶ 11. Marksteiner is wrong. The School Board, as a Commission licensee, is bound by the Commission's considered determination as to what constitutes the public interest with regard to the DTV table of allotments, unless that determination is arbitrary, capricious or otherwise not in accordance with law. No final determination, however, has been reached in that regard.

The School Board believes that the Commission would have, on its own, concluded that the requested amendment of the DTV table of allotments is not warranted. Indeed, it appears to the School Board, from its review of the pleadings in the instant rule making proceeding, that a major consequence of the proposed amendment to the DTV table of allotments is that operation of WPPB-DT would result in prohibited contour overlap with station WJAN-CA on Channel 41 in nearby Miami. Since WJAN-CA is now a primary station, the Community Broadcasters Protection Act would require WPPB-DT to curtail its operations in order to protect WJAN-CA. In addition, the School Board does not believe that the public interest supports an amendment to the DTV table of allotments that would favor operation of station WHDT-LP on Channel 44, while curtailing operation of full-service station WPPB-DT on Channel 40.

In view of the foregoing, the Commission is now free to conclude that no change be made in the subject DTV allotments. Accordingly, the School Board respectfully requests that the Commission dismiss the petition to amend the DTV table of allotments.

Respectfully submitted,

**THE SCHOOL BOARD OF BROWARD
COUNTY, FLORIDA**

By: _____

Barry D. Wood
Paul H. Brown

WOOD, MAINES & BROWN,
CHARTERED
1827 Jefferson Place, NW
Washington, DC 20036
(202) 293-5333

its counsel

Dated: March 30, 2001

EXHIBIT A



Federal Communications Commission
Washington, D.C. 20554

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Kevin C. Boyle, Esq.
Latham & Watkins
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Margaret Miller, Esq.
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036-6802

Frank R. Jazzo, Esq.
Fletcher, Heald & Hildreth, PLC
1300 N 17th Street
11th Floor
Arlington, Virginia 22209

Re: Application for Assignment of Permit
Of Noncommercial Educational Television
Station WPPB-TV, Boca Raton, Florida
File No. BAPCT-199910018AAA
Fac. ID No. 51349

Joint Request for Approval of Settlement
Agreement in Connection with:
Applications for Extension of Time to
Construct and Modify WPPB-TV
File Nos. BPET-960626LA and BMPET-
960624KS; and Application for a
Construction Permit for a New Television
Station at Stuart, Florida; File No.
BPCDT-960920LH; Fac. ID No. 83924

Dear Counsel:

This is with respect to the Joint Request for Approval of Settlement between Palmetto Broadcasters Associated For Communities, Inc. (Palmetto), the permittee of noncommercial educational television station WPPB-TV, Channel *63, Boca Raton, Florida; Channel 63 of Palm Beach, Inc. (Channel 63), the proposed assignee of WPPB-TV; and Guenter Marksteiner, an applicant for a construction permit for a new

commercial television station on Channel 59 at Stuart, Florida.¹ There is also pending before the Commission an application for review filed by Marksteiner of the letter decision of the Video Services Division, dated November 12, 1998, granting Palmetto's applications to reinstate the expired construction permit for WPPB-TV and to modify the station's authorization, and an objection, dated December 16, 1998, filed by Palmetto against Marksteiner's application to specify DTV operations on Channel 59, alleging that the proposed facility would result in interference to WPPB-TV.

Pursuant to the terms of the settlement agreement, the parties agree, *inter alia*, to withdraw all objections, petitions and other filings directed against the above-referenced applications. In addition, Palmetto and Channel 63 have agreed to file a request to change the WPPB-TV DTV allotment from Channel *44 to Channel *40, in exchange for Marksteiner's agreement to pay Channel 63 the total sum of \$100,000 for the purpose of reimbursing the costs associated with changing the DTV allotment for WPPB-TV and constructing the modified facility.² Based upon the foregoing, we find that the parties have complied with Section 73.3588 of the Commission's rules. Under the terms of the agreement, no monetary consideration is being paid for the parties' mutual withdrawal of their various filings. The parties also have submitted declarations stating that except as disclosed in the settlement agreement, no money or other consideration has been paid or promised, directly or indirectly, to any of the parties or its principals. Accordingly, we find that the Joint Request for Approval of Settlement is consistent with the Commission's rules and policies and will serve the public interest. Further, we have reviewed the matters raised in the various pleadings, and find that they raise no substantial and material questions of fact requiring further inquiry.³ Having determined that Palmetto and Channel 63 are qualified in all respects, we find that grant of the application for assignment of noncommercial educational television station WPPB-TV will serve the public interest, convenience and necessity.

Accordingly, the December 28, 1998 application for review filed by Guenter Marksteiner in connection with station WPPB-TV, and the December 16, 1998 objection filed by Palmetto Broadcasters Associated for Communities, Inc. against Marksteiner's pending application, as amended, for a construction permit for a new station at Stuart, Florida (File No. BPCDT-960920LH) ARE DISMISSED, and the application for assignment of construction permit of noncommercial educational television station WPPB-TV from Palmetto to Channel 63 of Palm Beach, Inc. (File No. BAPET-

¹ The mutually-exclusive applicants for Channel 59, Stuart, filed a Joint Request for Approval of Universal Settlement on January 23, 1998, requesting grant of Marksteiner's application. The Universal Settlement and pleadings related to Marksteiner's application remain pending.

² In the *Sixth Report and Order*, the Commission indicated that it would consider negotiated or coordinated changes to the DTV Table where all affected parties agreed and the allotment modifications did not include relocating to channels 60 - 69. *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 12 FCC Rcd 14588 (1997). The Commission also clarified that negotiated agreements could include the exchange of money or other consideration from one station to another, including payments to and from noncommercial television stations operating on reserved channels. *Reconsideration of the Sixth Report and Order in Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 13 FCC Rcd 7418, 7477-78 (1998).

³ See *Booth American Company*, 58 FCC 2d 393, 554 (1976).

19991018AAA) IS GRANTED. The application filed by Guenter Marksteiner for a construction permit for a new commercial television station on Channel 59 at Stuart, Florida (File No. BPCDT-960920LH) remains pending.

Sincerely,



Clay C. Pendarvis
Chief, Television Branch
Video Services Division
Mass Media Bureau

CERTIFICATE OF SERVICE

I, Kerstin Koops Budlong, hereby certify that on this date I caused the foregoing "Reply to Comments in Opposition to Letter Request" to be served by U.S. first class mail, postage prepaid, on the following:

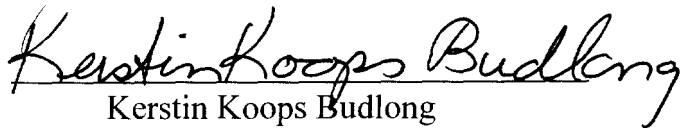
Frank R. Jazzo, Esq.
Vincent J. Curtis, Jr., Esq.
Anne Goodwin Crump, Esq.
Fletcher, Heald & Hildreth, PLC
1300 North 17th Street, 11th Floor
Rosslyn, VA 22209-3801
Counsel for Marksteiner

Margaret L. Miller, Esq.
Dow, Lohnes & Albertson
1200 New Hampshire Ave., NW
Suite 800 Washington, DC 20036
Counsel for Channel 63 of Palm Beach,
Inc.

Peter Tannenwald, Esq.
Irwin, Campbell & Tannenwald, PC
1730 Rhode Island Ave., Suite 1300
Washington, DC 20004
Counsel for Sherjan Broadcasting, Inc.

Kevin C. Boyle, Esq.
Lathan & Watkins
1001 Pennsylvania Ave., NW
Suite 1300
Washington, DC 20004
Counsel for Palmetto Broadcasters
Associated for Communities, Inc.

Pamela Blumenthal
Federal Communications Commission
Mass Media Bureau
445 12th St., SW, Room 2-A762
Washington, DC 20554


Kerstin Koops Budlong

Dated: March 30, 2001